

Introduction

1. By application filed on 27 June 2016, the Applicant contests the disciplinary measures imposed in accordance with staff regulations 10.1 (a) and 1.2 (b)129(witBTtn)] TJETBT1

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18. In an e-mail of 27 October 2014, the IGO investigator asked the Applicant to confirm, before 1 December 2014, that he was complying with the terms of decision No. 94 of the Court of Appeal, particularly with regard to the handover of the child to his former partner. She also informed him that a “failure to confirm ... [could] constitute professional misconduct”.

19. A second telephone interview was conducted by the IGO investigator with the Applicant on 15 December 2014, during which the Applicant stated that “all remedies [had not] been exhausted and [were] far from having been exhausted,” and that his appeal to the Court of Cassation was still pending. The investigators asked him to provide them with proof, before 7 January 2015, that (1) the decision of the Court of Appeal was not enforceable and (2) the Applicant had filed an appeal to the Court of Cassation. They reiterated that request by e-mails of 30 December 2014 and 12 TJETBT1 0 0 1 99.20 1.264a1 0 m4(r 2(4)-00B4}TJSApple589.BTOGe)4(a(c)

appeal on points of law before 5 March 2015 and informing him that, after that deadline, IGO would consider the order of the Court^{25.62} m that, after th

b. “[F]ailing to fulfil [his] duty to comply with and perform [his] private legal obligations in accordance with the order issued by the *Tribunal de Grande Instance of Ouagadougou* on 10 January 2014 and the decision of the First Civil Chamber of the Court of Appeal of Ouagadougou on 20 August 2014 (staff regulation 1.1 (f) and staff rule 1.2 (b))”; and

c. “[K]nowingly failing to cooperate with an investigation by the Inspector General’s Office (staff regulation 1.2 (r))”.

29. The Applicant was invited to respond to these allegations in writing and was informed of his right to seek the assistance of counsel, in accordance with administrative instruction ST/AI/371/Amend.1.

30. The Applicant responded to the allegations on 10 August 2015.

31. In a letter of 11 April 2016 entitled “Disciplinary measures”, the Director of the Division of Human Resources Management, UNHCR, informed the Applicant of the decision of the High Commissioner to impose three disciplinary measures on him, namely: a written censure, the loss of three steps in grade, and deferment, for a period of three years, of eligibility for consideration for promotion, pursuant to staff rule 10.2 (i), (ii) and (vi). She included a copy of the written censure, dated 1 April 2016, and informed the Applicant that it would be placed in his personnel file.

32. In the written censure, the High Commissioner refers to the three disciplinary measures and notes:

You are currently failing to comply with your private obligations, as you have not obeyed the rulings of the courts of Burkina Faso. Consequently, you are required to report every six months on measures taken to fulfil your private legal obligations. The Division of Human Resources Management will expect your first report [on] 1 September 2016. If you refuse to submit a report every six months or if you refuse to comply with the court orders, I will initiate a new disciplinary process that could lead to more severe disciplinary measures.

33. On 27 June 2016, the Applicant filed an application with the United Nations Dispute Tribunal contesting the disciplinary measures imposed on him by the

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inform the Division of Human Resources Management that he did not have legal custody of his son;

- e. His refusal to comply with the orders of the courts of Burkina Faso is incompatible with the obligation of staff members established under staff rule 1.2 (b); similarly, his refusal to transmit a copy of the statement in support of his appeal on points of law constitutes a violation of staff rule 1.2 (c);
- f. His failure to inform the Division of Human Resources Management that he did not have legal custody of his son constitutes a violation of staff rule 1.5 (a), which caused the Respondent financial losses;
- g. The established facts thus amount to misconduct under staff rule 10.1 (a);
- h. It was the Applicant who filed a motion instituting proceedings with the courts of Burkina Faso in order to obtain full custody of his son. The courts, after hearing both parents, explicitly took the child's best interests into consideration and found that the mother would be a better caretaker for the child; they therefore did not automatically or systematically grant custody of the child to the mother, as the Applicant alleges;
- i. In taking the contested decision, the High Commissioner acknowledged and took into account as a mitigating circumstance in determining disciplinary sanctions the fact that the child's mother "had either organized or participated in the temporary abduction of [his] child from [his] home"; however, he correctly concluded that this did not absolve the Applicant of all responsibility because, in relocating the child without being authorized to do so, the Applicant had attempted to take justice into his own hands in what amounts to international child abduction;

- j. In determining disciplinary sanctions, the High Commissioner enjoys broad discretionary power; he took into account one aggravating circumstance and four mitigating circumstances; he also took into consideration past practice in disciplinary matters and the gravity of the misconduct;
- k. The measures imposed were proportionate and the Applicant did not specify which measures would have been more appropriate or which mitigating circumstances the High Commissioner might have failed to take into account;
- l. In the context of a disciplinary process at the United Nations, the Applicant has no right to examine or cross-examine anyone; that right may only be exercised before the United Nations Dispute Tribunal;
- m. Moreover, the report of the Resident Representative of UNHCR in Burkina Faso was duly taken into consideration and was included with the IGO investigation report; the High Commissioner never questioned the truthfulness or accuracy of the claim that the Applicant's former partner had organized the abduction of the child from his home on 20 October 2013; this amounts to a mitigating circumstance and was considered as such, although it does not absolve the Applicant of responsibility;
- n. A staff member does not have the right to legal assistance until the investigation has been completed and the disciplinary process begun, i.e., from the time of receipt of the letter informing him or her of the allegations of misconduct against him or her; in this case, the letter detailing the charges duly informed the Applicant that he was entitled to counsel; and
- o. The application has to be dismissed.

Judgment

39. At the time the contested decision was taken, the applicable texts on disciplinary sanctions were staff regulation 10.1 (a) (contained in ST/SGB/2016/1¹), according to which the Secretary-General “may impose disciplinary measures on staff members who engage in misconduct”, and staff rules 10.1 to 10.3, which provide as follows:

Rule 10.1 Misconduct

(a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

(b) Where the staff member’s failure to comply with his or her obligations or to observe the standards of conduct expected of an in

- (iv) Suspension without pay for a specified period;
- (v) Fine;
- (vi) Deferment, for a specified period, of eligibility for consideration for promotion;
- (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
- (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
- (ix) Dismissal.

...

Rule 10.3
Due process in the disciplinary process

- (a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that

Tribunal must determine the following (*Masri* 2010-UNAT-098, *Shahatit* 2012-UNAT-195, *Portillo Moya* 2015-UNAT-523):

- a. Was the appropriate standard of proof applied in establishing the alleged facts?;
- b.

enforceable or has been erroneously designated as a final ruling.” However, in contrast to a typical appeal, an appeal on points of law is an extraordinary remedy that does not suspend the enforcement of a ruling. In the present case, the Applicant—even though he submitted an appeal on points of law—thus failed to comply with a final and enforceable court decision granting custody of his son to the child’s mother.

51. The Applicant maintains that the Administration was aware of the fact that custody of the child had been awarded to the mother, which was, moreover, the subject of the IGO investigation.

52. The Tribunal notes that it was not the Applicant who informed the Organization of the change in his status and of the court decision of 10 January 2014 to award custody of his son to the child’s mother. On the contrary, even though his lawyer had appealed that decision before the Court of Appeal of

final and enforceable decision of the Court of Appeal of Burkina Faso, the Applicant failed to fulfil his obligation under staff rule 1.2 (b).

55. Furthermore, according to

Due Process

60. The Applicant questions, on the one hand, the lawfulness of the process, citing, *inter alia*, a failure to comply with the standards of the European Convention on Human Rights and, on the other, the proportionality of the disciplinary measures to the acts committed, in the light of his son's best interests.

Application of internal rules

61. In analysing the lawfulness of the disciplinary process, the Tribunal must refer to the specific legal framework of the United Nations disciplinary process while also considering, as suggested by the Applicant, the application of article 6.3 (d) of the European Convention on Human Rights, article 10 of the Universal Declaration of Human Rights, and article 14.3 of the International Covenant on Civil and Political Rights.

62. It should be recalled that the United Nations internal justice system is a *sui generis corpus juris* consisting of a set of specific rules with its own hierarchy and targeting a specific group of employees: international civil servants.

63. International civil servants have a specific legal status, are subject to the authority of the Secretary-General and must respect the Charter of the United Nations, the principles and aims of the Organization, as well as all internal United Nations rules and regulations.

64. Moreover, the United Nations is an international organization, not a State. As such, it does not have the status of a contracting party to the European Convention on Human Rights and, consequently, that Convention does not apply to relations between the United Nations and its employees, who are international civil servants (see Administrative Tribunal of the International Labour Organization Judgment No. 2662 (2007), para. 12).

65. Aside from the fact that the United Nations is not a contracting party to the European Convention on Human Rights, it should also be taken into account that this case concerns disciplinary proceedings, not criminal proceedings, and that, even among States parties to the European Convention on Human Rights, a

36. While the statutory instruments governing the investigation and disciplinary process in the present case are different instruments to those which governed the Applicant's case, our jurisprudence remains that the due process entitlements, which every staff member has, come into play in their entirety once a disciplinary process is initiated. Furthermore, we have held in *Powell* that at the preliminary stage, only limited due process rights apply.

(b) Should the facts appear to indicate that misconduct has occurred, refer the matter to a Joint Disciplinary Committee for advice; or

(c) Should the evidence clearly indicate that misconduct has occurred, and that the seriousness of the misconduct warrants immediate separation from service, recommend to the Secretary-General that the staff member be summarily dismissed. The decision will be taken by or on behalf of the Secretary-

Inspector General's Office sent the Applicant a preliminary investigation report, giving him a time limit to respond. On 8 May 2015, the Applicant responded and, on 22 May 2015, the Inspector General's Office issued its final report and forwarded it to the Director of the Division of Human Resources Management, UNHCR.

80. On 15 July 2015, a letter was sent to the Applicant informing him of the allegations of misconduct. The letter also informed the Applicant of his right to seek the assistance of a counsel of his choice and invited him to respond to the allegations made against him within two weeks. He submitted his comments on

96. The Applicant maintains that, if he had handed his son over to the mother, he would have placed the child in imminent danger. The Tribunal could envisage that, in extreme cases, it would be justified for a staff member, as a parent, not to hand his child over to the child's legal guardian despite a final enforceable ruling by a national court. This could be the case where there is clear evidence that the legal guardian is putting the child in real, imminent and grave danger (such as selling him o

not constitute a violation of the principle of *non bis in idem* by virtue of the decision of 11 April 2016.

Decision

104. In view of the foregoing, the Tribunal DECIDES:

The application is rejected in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 10th day of April 2017

Entered in the Register on this 10th day of April 2017

(Signed)

René M. Vargas M., Registrar, Geneva